

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Petition for Forbearance from	)	WT Docket No. 01-184
Commercial Mobile Radio Services	)	
Number Portability Obligations	)	

**JOINT REPLY COMMENTS OF  
VOICESTREM WIRELESS CORPORATION AND  
UNITED STATES CELLULAR CORPORATION**

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## Summary

VoiceStream and U.S. Cellular make the following five points in these reply comments:

1. Section 10 of the Communications Act requires forbearance of the CMRS LNP obligation. Although states and resellers oppose forbearance, all available facts rebut their undocumented assertions that LNP will promote competition within the CMRS sector and/or between the CMRS and LEC sectors. In addition, states and resellers do not address the relevant statutory criteria, and when these criteria are applied, the conclusion is inescapable that the FCC must forbear from applying its LNP mandate.

2. Repeal of the LNP mandate is also required by Section 11 of the Communications Act. Although Section 11 of the Communications Act requires the FCC to review “all regulations” every two years, the FCC has never reviewed its five-year-old LNP mandate under Section 11. The Section 11 criterion for repeal of the LNP mandate — meaningful competition renders the rule unnecessary — is clearly satisfied. In fact, the FCC Chairman noted two years ago that “I cannot imagine any other industry segment that can better laud their state of economic competition as ‘meaningful.’” Competition in the CMRS has only intensified over the past two years, further justifying elimination of the LNP mandate under Section 11.

3. At minimum, the FCC should postpone the CMRS LNP conversion deadline until CMRS pooling has been successfully implemented. CMRS pooling, including the MIN/MDN separation, is a major undertaking that requires the involvement and cooperation of over 250 different carriers. The failure of certain carriers to timely implement these changes will adversely effect the roaming capabilities currently available to mobile customers. The FCC should not require the CMRS industry to convert simultaneously to LNP because of the substantial risk that such additional conversion would only increase the number of mobile customers that encounter problems with their mobile service. If preserving network reliability and service quality is important, the FCC should postpone the LNP conversion date until there is confidence that pooling has been implemented successfully — and without adversely affecting existing capabilities such as roaming.

4. The FCC should confirm that states may not require CMRS providers to implement LNP. The FCC must reject Vermont’s request that states be permitted to require CMRS carriers to implement LNP — that is, render meaningless any forbearance order that the FCC enters. A state-imposed LNP obligation would constitute impermissible entry regulation under Section 332(c)(3). In addition, a state LNP order, if implemented, would prevent certain CMRS customers from receiving interstate calls, and the FCC must enter a preemption order to preserve the right of customers to receive all calls made to them.

5. The FCC should decide the forbearance petition by the end of the year. Implementation of number pooling is important, and the public interest is served by having CMRS carriers focus their resources on timely implementing pooling. The public interest is not served if CMRS carriers must share finite resources on implementing pooling and LNP simultaneously. The FCC should promptly decide the LNP forbearance issue so carriers can re-deploy their resources and focus on timely implementation of pooling.

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VoiceStream Wireless Corporation and United States Cellular Corporation (collectively, “Joint Commenters”) submit this reply in response to the comments filed in this forbearance proceeding involving wireless local number portability (“LNP”).

**I. SECTION 10 OF THE COMMUNICATIONS ACT REQUIRES FORBEARANCE OF THE CMRS LNP OBLIGATION**

This proceeding is governed by Section 10 of the Communications Act, which requires the Commission to forbear from applying its LNP mandate if three statutory criteria are met.<sup>1</sup> While opponents of LNP forbearance make many arguments in their comments, only two of them even mention Section 10 and none analyzes the issues under the Section 10 criteria.<sup>2</sup> The facts are indisputable that all three statutory criteria are satisfied here. Accordingly, under the Act, the “Commission shall forbear from applying [its LNP] regulation.”<sup>3</sup>

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<sup>1</sup> See 47 U.S.C. § 160(a) (“[T]he Commission *shall* forbear from applying any regulation . . . if the Commission determines” that three statutory criteria are satisfied.) (emphasis added). See also *2000 Biennial Review*, IB Docket No. 00-202, FCC 01-93, at ¶ 10 (March 20, 2001); *Oncor Forbearance Petition*, 16 FCC Rcd 4382, FCC 01-51, at ¶ 2 (Feb. 9, 2001); *Certain Wireless Carrier Forbearance Order*, 15 FCC Rcd 17414, 17416-17 ¶ 3 (Sept. 8, 2000).

<sup>2</sup> Vermont and the Association of Communications Enterprises (“ASCENT”) mention Section 10 in their comments, but do not undertake a Section 10 analysis.

<sup>3</sup> 47 U.S.C. § 160(a).

While the focus of this proceeding is on forbearance of the LNP mandate, the Commission must remember that there remains a substantial question whether the mandate is lawful in the first instance.<sup>4</sup> There is an issue whether the Commission possesses the statutory authority to require providers of commercial mobile radio service (“CMRS”) to provide LNP, given that the Commission imposed the requirement only six months after Congress deliberately excluded CMRS carriers from LNP requirements.<sup>5</sup> In addition, even if the Commission has the jurisdiction to act, there is a substantial question whether the LNP decision would pass muster under the Administrative Procedures Act, because the Commission failed to perform a cost-benefits analysis before imposing the requirement.<sup>6</sup> Of course, these legal issues would become moot if the Commission exercises its Section 10 forbearance authority.

#### **A. CMRS LNP Is Not Necessary to Ensure Just and Reasonable Rates**

The first prong of the Section 10 forbearance test requires the Commission to examine whether retaining its LNP rules is necessary to ensure that CMRS charges and practices are just and reasonable.<sup>7</sup> New Hampshire asserts, without reciting a single fact, that the “[f]ailure to require LNP for wireless carriers will result in unreasonable rates, terms and conditions for wire-

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<sup>4</sup> Carriers may challenge the lawfulness of rules when the FCC attempts to enforce them even though the limitations period for challenging the rule otherwise would have expired. *See, e.g., Graceba Total Communications v. FCC*, 115 F.3d 1038, 1040 (D.C. Cir. 1997); *Geller v. FCC*, 610 F.2d 973 (D.C. Cir. 1979); *Functional Music v. FCC*, 274 F.2d 543 (D.C. Cir. 1959). Thus, a denial of the forbearance petition will likely result in a challenge to the validity of the LNP rules themselves.

<sup>5</sup> The FCC asserted it had “independent authority” to act “as we deem appropriate,” relying on Section 332 – a statute Congress enacted to deregulate the CMRS industry. *See First LNP Order*, 11 FCC Rcd 8352, 8431 ¶ 153 (1996). *But see* Kathleen Q. Abernathy, FCBA Luncheon Address (Sept. 17, 2001) (“Congress sets our agenda in the Communications Act, and our job is to implement the statute, not to pursue our own policy preferences.”).

<sup>6</sup> This omission is especially perplexing because in another order adopted the same day, the FCC again recognized that a cost-benefits analysis was central in determining whether new regulations should be imposed on CMRS providers. *See Second CMRS Interconnection Order*, 11 FCC Rcd 9462, 9473 ¶ 18 (1996). *See also Connecticut CMRS Rate Order*, 10 FCC Rcd 7025, 7031 ¶ 10 (1995), *aff’d*, 78 F.3d 842 (2d Cir. 1996) (“The statutory plan is clear. . . . Congress delineated its preference for allowing this emerging [CMRS] market to develop subject to only as much regulation for which the Commission and the states could demonstrate a clear cut need.”); *CMRS Resale Order*, 11 FCC Rcd 18455, 18463 ¶ 14 (1996) (CMRS regulation should “not be imposed unless clearly warranted.”).

less service.”<sup>8</sup> This assertion is frivolous. As Connecticut notes, “the price per minute of cellular use has decreased by 64% between 1993 and 2000.”<sup>9</sup>

The Bureau of Labor has been monitoring the price of mobile service since December 1997. Between December 1997 and August 2001, the Consumer Price Index for mobile service has fallen by nearly 32 percent— from a CPI of 100 in December 1997 to a CPI of 68.1 in August 2001.<sup>10</sup> Over 23 million additional Americans became mobile services customers during 2000 alone — more than 10 percent of the U.S. population over the age of 14.<sup>11</sup> This many Americans would not have subscribed to mobile services if CMRS prices were unjust, unreasonable or discriminatory.

Moreover, there is no evidence supporting the proposition that current prices will fall with LNP. As VoiceStream documented in its comments, prices for fixed landline services have increased since LECs deployed LNP while CMRS prices have continued to fall without LNP.<sup>12</sup> Moreover, as Sprint PCS has pointed out, mobile customers in countries where wireless LNP is available pay rates far in excess of what American consumers pay for mobile service.<sup>13</sup>

Vermont asserts without explanation that “[s]ervice that does not offer number portability is not just and reasonable service.” This contention also lacks merit. Congress deliberately decided that landline LECs should provide LNP, but that CMRS providers need not provide LNP.<sup>14</sup>

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<sup>7</sup> See 47 U.S.C. § 160(a)(1).

<sup>8</sup> New Hampshire Comments at 3.

<sup>9</sup> Connecticut Comments at 5.

<sup>10</sup> See Bureau of Labor Statistics, Consumer Price Index, Cellular Telephone Services, U.S. City Average.

<sup>11</sup> See *Sixth Annual CMRS Competition Report to Congress*, FCC 01-192, at 5 (July 17, 2001) (“*Sixth Annual CMRS Report*”).

<sup>12</sup> See VoiceStream Comments at 7.

<sup>13</sup> See Sprint PCS Reply Comments at 16.

<sup>14</sup> See 47 U.S.C. § 251(b)(2).

Similarly, the Commission specifically determined over two years ago that LNP is “not necessary to prevent unjust or unreasonable charges or practices by CMRS carriers”:

[N]ot only is CMRS competition currently growing rapidly without LNP, but in the near term, LNP does not appear to be critical to ensuring that this growth continues.<sup>15</sup>

In summary, there is *no* record evidence supporting the argument that the LNP mandate is necessary to ensure that CMRS prices and practices are just and reasonable.

## **B. CMRS LNP Is Not Necessary to Protect Consumers**

The second prong of the Section 10 forbearance standard requires the Commission to consider whether enforcement of the CMRS LNP obligation is necessary to protect consumers.<sup>16</sup> States and resellers contend that LNP would benefit consumers because “[c]hanging one’s telephone number is a great inconvenience to customers.”<sup>17</sup> However, Congress did not say that the Commission may maintain rules because certain consumers may find the rules “convenient.” Congress has rather decided that regulations must be eliminated unless they are “necessary for the protection of consumers.”

No one can credibly contend that LNP is “necessary for the protection of customers.” The Commission has noted that 20 million Americans, one in five mobile customers, changed service providers during 2000.<sup>18</sup> If churn rates remain at these levels, an additional 20 million Americans will change carriers this year (perhaps more given the continued growth in mobile customer subscriber base). LNP is certainly not necessary to protect these consumers. States and resellers never explain why any mobile customer requires LNP for his or her protection.

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<sup>15</sup> *CMRS LNP Forbearance Order*, 14 FCC Rcd 3092, 3101-02 ¶ 19 (1999).

<sup>16</sup> *See* 47 U.S.C. § 160(a)(2).

<sup>17</sup> Ohio Comments at 5.

<sup>18</sup> *See Sixth Annual CMRS Report* at 23-24.

The Commission has observed that “the high incidence of switching between wireless carriers (popularly referred to as “churn”) indicates that many wireless customers easily and routinely switch from one carrier to another without the benefit of number portability.”<sup>19</sup> Accordingly, the facts are indisputable that LNP is not “necessary for the protection of customers.”

### **C. CMRS LNP Forbearance Is Consistent with the Public Interest**

The third and final prong of a Section 10 analysis is for the Commission to consider whether forbearance is “consistent with the public interest.”<sup>20</sup> Some forbearance opponents contend that LNP is necessary to promote competition among CMRS providers, while other forbearance opponents assert that LNP is instead necessary to promote competition between the wireless and landline industries. Neither argument has merit, as the Joint Commenters demonstrate below.

#### **1. LNP Will Not Promote Competition Within the Mobile Services Sector**

Resellers assert that LNP will promote competition among CMRS providers “through the enhancement of service quality, affordability, and variety.”<sup>21</sup> These claims, entirely unsubstantiated, are not credible on their face:

- LNP will *not* improve service quality. A recent article in the Washington Post documented the capacity problems CMRS providers are experiencing in the Washington, D.C. metropolitan area. The problem, the reporter noted correctly, is that “the number of cell-phone subscribers is growing faster than the carriers are

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<sup>19</sup> *CMRS LNP Forbearance Order*, 14 FCC Rcd at 3103 ¶ 22.

<sup>20</sup> *See* 47 U.S.C. § 160(a)(3).

<sup>21</sup> ASCENT Comments at 4. *See also* WorldCom at 4 (LNP would provide “many consumer benefits, such as lower rates and better service quality.”).



upgrading their systems.”<sup>22</sup> LNP will not fix this problem. In fact, LNP will worsen this problem because finite capital spent on LNP necessarily is capital not available to expand network capacity and improve service quality.

- LNP will **not** improve the variety of services available to customers. LNP does not enable a CMRS carrier to provide a single new service. Nor will LNP enable one carrier to distinguish its services from its competitors in any way (since the entire industry is spending money on implementing the same regulatory mandate). In fact, LNP reduces the opportunity for carriers to distinguish themselves and provide greater “variety” to customers, because finite capital spent on LNP necessarily is capital not available for investing in new services that would enable them to give the public new alternatives and distinguish themselves from competitors.
- LNP will **not** result in lower prices. As discussed above, all available evidence suggests that retail prices will increase with LNP. After all, since LNP does not result in the provision of any new services that would generate any new revenues, sizable LNP implementation costs necessarily must be recovered from customers in the form of higher prices for existing services. Given that all carriers are facing similar cost increases, there will be little competitive pressure to allocate LNP costs to shareholders rather than customers.

The perverse effect that the regulatory LNP mandate is having on competitive markets (by forced reallocation of finite capital resources) is more pronounced because of the economic slowdown. As the president of one consulting firm stated earlier this month:

Capital is so constrained at the moment, it’s the worst I’ve ever seen it. The wireless guys we’ve talked to are talking about flat or slightly reduced [capital] expenditures, which ultimately means less network capacity.<sup>23</sup>

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<sup>22</sup> THE WASHINGTON POST, Yuki Noguchi, “Capacity That Can’t Handle Demand,” at E01 (Oct. 5, 2001).

Two years ago, the Commission extended the LNP deadline because LNP “has the potential to divert available financial and technical resources from other initiatives that could have a more immediate impact on competition, such as network buildout”:

[I]nvestment in buildout will be critical to broadband CMRS carriers as they seek to improve coverage and service quality in response to growing consumer demand. Thus, if carriers are required to implement number portability within the same time frame as these other initiatives, this could slow network buildout and system development efforts necessary to meet these other demands.<sup>24</sup>

The Commission also noted that “CMRS carriers are currently devoting substantial resources to . . . regulatory requirements, such as E911 and CALEA, which are designed to meet important public interest needs but likely will result in some additional technical burden.”<sup>25</sup>

These observations are equally applicable today. In fact, given the capital needed for deployment of 3G networks and the benefits this investment could have on the nation’s productivity and economy — \$53-\$111 billion annually according to the Council of Economic Advisors<sup>26</sup> — the LNP mandate would have an even more deleterious effect on the market today.

## **2. LNP Will Not Promote Competition Between the Wireless and Landline Sectors**

For the most part, states make a different argument than resellers. States assert that LNP would promote competition between landline carriers and wireless carriers — LEC/CMRS competition. For example, Ohio claims that the absence of LNP “will definitely suppress wireless/wireline competition.”<sup>27</sup> Connecticut states that the proposition that “CMRS LNP is not necessary to promote competition between wireline and wireless providers is absolutely ridicu-

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<sup>23</sup> THE WASHINGTON POST, Yuki Noguchi, “Capacity That Can’t Handle Demand.” At E01 (Oct. 5, 2001).

<sup>24</sup> *CMRS LNP Forbearance Order*, 14 FCC Rcd at 3111 ¶ 38.

<sup>25</sup> *Id.*

<sup>26</sup> See The Council of Economic Advisors, “The Economic Impact of Third-Generation Wireless Technology,” at 1 (Oct. 2000).

<sup>27</sup> Ohio Comments at 7.

lous.”<sup>28</sup> The State Coordinating Group makes the argument most starkly in asserting that grant of forbearance “will guarantee that wireless service will not become truly competitive with wireline local exchange service.”<sup>29</sup> The states, however, never explain how LNP would promote LEC/CMRS competition. Presumably, they believe that with LNP, customers of fixed landline residential services will become customers of mobile wireless services.

In fact, direct LEC/CMRS competition is already occurring — and on a massive scale. The advertisement Connecticut appends to its comments documents that mobile service is often a better value than fixed service:

**Comparison of Fixed and Mobile  
Service in Connecticut<sup>30</sup>**

	<u>Landline</u>	<u>Wireless</u>
Monthly Service	\$18.53	\$35.00
Call Waiting	\$4.50	Included
Caller ID	\$7.50	Included
3-Way Calling	\$4.00	Included
Voice Mail	\$6.50	Included
Long Distance	\$25.00	Included
Goes Anywhere	No	Yes
<b>Total</b>	<b>\$66.03</b>	<b>\$35.00</b>

The direct competition that exists between LECs and CMRS providers is further confirmed by competition for “second lines.” Almost twice as many American households subscribe to mobile service than subscribe to second “land lines” — 52 percent<sup>31</sup> vs. 28.6 percent respectively.<sup>32</sup>

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<sup>28</sup> Connecticut Comments at 3.

<sup>29</sup> State Coordinating Group Comments at 9-10.

<sup>30</sup> See Attachment 1 to Connecticut Comments.

<sup>31</sup> See J.D. Power and Associates, “Wireless Phone Penetration Among U.S. Households Climbs Above 50 Percent as More First-Time Subscribers Enter the Marketplace” (Sept. 26, 2001).

<sup>32</sup> See *Trends in Telephone Service*, Table 8.4 (Aug. 2001).

The CMRS industry has been growing much faster than the LEC industry. As the following table documents, in recent years the CMRS industry has been acquiring customers at a rate two or three times that of LECs:

**Comparison of Fixed and Mobile Customer Growth  
(End of Year Data in Millions)**

	<u>New LEC Residential Customers</u> <sup>33</sup>	<u>New CMRS Customers</u> <sup>34</sup>	<u>Total LEC Residential Customers</u>	<u>Total CMRS Customers</u>
1996	4.0	10.3	108.1	44.0
1997	7.5	11.3	115.6	55.3
1998	4.3	13.0	119.9	69.2
1999	7.9	16.8	127.8	86.0
2000	NA	24.5	NA	109.5
Oct. 2001	NA	12.5	NA	122.0

If these CMRS growth rates continue, the number of mobile customers will soon exceed the number of residential customers of fixed service. In fact, 55 percent of all Americans today above the age of 14 are already mobile customers.<sup>35</sup> Thus, Texas is simply mistaken when it asserts that without LNP, “wireline and wireless providers will never truly compete for the same customers,”<sup>36</sup> because *most Americans are already customers of both wireless and landline services.*

The states appear to base their LEC/CMRS competition argument on the concept of service substitution: people supposedly need LNP before they will replace wireless service with

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<sup>33</sup> Data obtained from *Trends in Telephone Service*, Table 8.4 (Aug. 2001).

<sup>34</sup> Data obtained from CTIA’s Semi-Annual Wireless Industry Survey.

<sup>35</sup> According to the U.S. Census Bureau, last year there were 221.1 million Americans aged 15 years or older. See U.S. Department of Commerce, Profiles of General Demographic Characteristics (May 2001). CTIA estimates that there are currently over 122 million mobile customers.

<sup>36</sup> Texas Comments at 4. See also Michigan Comments at 3; New Hampshire Comments at 11.

landline service. But the issue is not substitution, when most Americans and American households already subscribe to *both* mobile service *and* landline service.

It is noteworthy that complete substitution is already beginning to occur. The Commission recently noted surveys demonstrating that about three percent of mobile customers rely on their handset as their only phone.<sup>37</sup> As significant is another survey finding that 45 percent of mobile customers aged 18 to 34 years old stated they would rather give up their landline phone than their wireless handset.<sup>38</sup>

Additional consumers will abandon landline service only if they are comfortable with wireless coverage and service quality. Thus, to compete effectively against LECs, CMRS carriers need to invest in additional cell sites, both to serve new areas and to reduce blockage rates in existing areas. They also need to invest in new services such as wireless web and location services. The sure way to inhibit LEC/CMRS competition is for the government to require industry to divert finite capital resources from investing in service improvements to implementing a government mandate that will increase prices for existing services —*thereby making wireless a less attractive alternative to landline services.*

In summary, intense wireless/wireline competition already exists, and CMRS carriers are winning the war — without LNP. The regulatory LNP mandate will actually inhibit, not promote, LEC/CMRS competition. Because all three Section 10 statutory criteria are satisfied, the Commission is legally required to forbear from applying its LNP mandate.

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<sup>37</sup> See *Sixth Annual CMRS Report* at 32

<sup>38</sup> See *id.*

## **II. REPEAL OF THE LNP MANDATE IS REQUIRED BY SECTION 11 OF THE COMMUNICATIONS ACT**

Congress enacted the Telecommunications Act in 1996 “to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.”<sup>39</sup> Congress anticipated that as competition developed, market forces would reduce the need for regulation.<sup>40</sup> It therefore specified in Section 11 that the Commission “*shall* review *all* regulations . . . that apply to the operations or activities of any provider of telecommunications service.”<sup>41</sup> Congress further directed that the Commission “*shall repeal* or modify any regulation it determines to be no longer necessary in the public interest” as the result of “meaningful economic competition between providers of such service.”<sup>42</sup>

The Commission has conducted two Section 11 biennial reviews, in 1998 and 2000. Notwithstanding the Congressional directive that it review “all regulations,” the Commission has *never* reviewed its LNP mandate. This omission is especially odd because Congress specifically determined in the 1996 that landline carriers, but *not* wireless carriers, should implement LNP.<sup>43</sup> With the passage of five years, it is time, finally, for the Commission to review the continued need for its LNP mandate under Section 11 of the Act.

No one can credibly assert that meaningful economic competition does not exist in the CMRS market. As then Commissioner Powell has noted:

I cannot imagine any other industry segment that can better laud their state of economic competition as “meaningful.” Prices are down and falling. Innovation,

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<sup>39</sup> 1996 Act, Introductory Statement.

<sup>40</sup> See Joint Managers’ Statement, S. CONF. REP. NO. 104-230, 104<sup>th</sup> Cong., 2d Sess. 113 (1996), at 1 (stating that the 1996 Act would establish a “pro-competitive, deregulatory national policy framework.”).

<sup>41</sup> 47 U.S.C. § 161(a)(emphasis added).

<sup>42</sup> *Id.* at §§ 161(a)(2), 161(b).

<sup>43</sup> See *id.* at § 251(b)(2).

churn and penetration are up and still climbing. And, as this item points out, the newer PCS licensees are adding more new customers than the incumbent cellular carriers. All of this seems pretty “meaningful” to me.<sup>44</sup>

The Chairman made this observation two years ago, in September 1999. Competition has intensified dramatically during the intervening two years. Today, 75 percent of the population can choose from at least five CMRS carriers, and 47 percent of the population can choose among six different mobile operators.<sup>45</sup> During the past two years alone, the average price for mobile service has fallen by over 17 percent.<sup>46</sup> Thus, if competition in the CMRS market was meaningful in September 1999, competition in this market is certainly meaningful today.

If meaningful competition exists, Section 11 specifies that the Commission “*shall repeal or modify any regulation.*”<sup>47</sup> The Commission imposed the LNP mandate on the CMRS industry because it “believed” that LNP would “remove barriers to competition” and “likely stimulate the development of new services and technologies”:

[T]he inability of customers to keep their telephone numbers when switching carriers also hinders the successful entrance of new service providers into the cellular, broadband PCS, and SMR markets. We believe, therefore, that service provider portability, by eliminating one major disincentive to switch carriers, will ameliorate customers’ disincentive to switch carriers if they must purchase new equipment.<sup>48</sup>

The Commission’s “beliefs” in 1996 have not been confirmed by subsequent experience. CMRS carriers have introduced new services and technologies at an unparalleled pace — without LNP. In fact, the Chairman has commended the CMRS industry for being “at the cutting

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<sup>44</sup> Separate Statement of (then) Commissioner Michael Powell, *1999 Spectrum Cap Order*, 15 FCC Rcd 9219, 9296 (1999).

<sup>45</sup> *Sixth CMRS Annual CMRS Report*, FCC 01-192, at 506 (July 17, 2001).

<sup>46</sup> According to Consumer Price Index data maintained by the Bureau of Labor Statistics, the CPI of mobile service was 82.6 in September 1999 and 68.1 in August 2001.

<sup>47</sup> 47 U.S.C. § 161(b)(emphasis added).

<sup>48</sup> *First LNP Order*, 11 FCC Rcd 8352, 8434-35 ¶¶ 157-58 (1996).

edge of innovation.”<sup>49</sup> LNP certainly has not been necessary to facilitate the viable entry of new providers because, as the Chairman has recognized, PCS licensees like VoiceStream are growing at a rate faster than incumbent cellular carriers. Finally, LNP is not necessary to facilitate customer churn, given that last year alone, 20 million Americans — one in five mobile customers — changed service providers last year without LNP. In summary, LNP is a classic regulatory solution for a problem that does not exist.

The Commission is legally required to forbear from applying its LNP mandate under Section 10, as demonstrated above. But the Commission is also required to repeal the mandate under Section 11 as well.

### **III. AT MINIMUM, THE COMMISSION SHOULD POSTPONE THE LNP CONVERSION DEADLINE TO PRESERVE NETWORK RELIABILITY AND SERVICE QUALITY**

VoiceStream and U.S. Cellular believe that given the facts in the record, the Commission is legally required to abrogate the LNP mandate under both Section 10 and Section 11. If, however, the Commission disagrees, it should at minimum defer the LNP conversion date until it is confident that number pooling has been implemented successfully. The Commission should not permit a regulatory mandate of dubious validity to interfere with the important task of implementing pooling. In addition, as demonstrated below, the current LNP deadline poses an undue risk to service quality.

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<sup>49</sup> Transcript of Remarks of Chairman Michael K. Powell Before Cellular Telecommunications Internet Association’s CTIA Wireless 2001 (March 20, 2001).



**A. There Is a Substantial Question Whether the National Systems Can Accommodate the Simultaneous Flash-Cut Conversions of CMRS Pooling and Porting**

FCC rules specify that LNP may “not result in unreasonable degradation in service quality or network reliability” when implemented or when customers switch carriers.<sup>50</sup> VoiceStream and other CMRS providers have expressed concern over the current LNP deadline of November 24, 2002, and the requirement that before that date all non-GSM carriers must complete installation and testing of the MIN/MDN separation. In this regard, the Wireless Number Portability Operations (“WNPO”) Team advised NANC earlier this month that the completion of necessary intercarrier testing will likely be delayed because “[s]witch and network component vendors [are] unable to provide upgrades for WNP until after October 2001 and possibly not until after May 2002” and because “[m]any non-participating providers in the top 100 MSAs have not yet identified their test readiness.”<sup>51</sup> In fact, the WNPO noted that only twenty percent of CMRS carriers in the top 100 MSAs are even participating in the Wireless Testing Subcommittee.<sup>52</sup>

Given the Commission’s commitment to network reliability and service quality, the Joint Commenters would hope that the Commission will consider seriously these concerns. They note that in related circumstances, the Commission extended the original LNP implementation schedule for LECs because it “consider[s] network reliability to be of paramount importance.”<sup>53</sup>

The Commission should also be concerned by the national infrastructure (SOA-to-NPAC and NPAC-to-LSMS interfaces and systems) that is needed for the successful implementation of both CMRS pooling and CMRS porting. The Commission is aware of the some of the problems

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<sup>50</sup> See 47 C.F.R. § 52.31(a), *incorporating* 47 C.F.R. § 52.23(a).

<sup>51</sup> Memorandum from James Grasser and Brigitte Brown, Co-chairs, Wireless Number Portability Operations Team, to Robert Atkinson, NANC Chair (Oct. 9, 2001).

<sup>52</sup> See *id.*

<sup>53</sup> *First LNP Reconsideration Order*, 12 FCC Rcd 7236, 7285 ¶ 83 (1997).

that this national system has been encountering, including the failure of NPAC Release 3.0 and the “slow horse” problem.<sup>54</sup> It makes no sense to aggravate these problems by adding CMRS porting volumes. The far better approach, VoiceStream submits, would be to fix these problems before CMRS providers begin using the national system.

There is another aspect of the national system that should concern the Commission: whether carrier systems can handle an immediate and dramatically larger increase in NPAC-to-LSMS volumes as a result of CMRS pooling and porting.<sup>55</sup> The Commission has recognized that the capacity of the national system is limited and that additional traffic should be added incrementally over time in order to preserve network reliability. For example, with the implementation of pooling, the Commission has determined that “staggered rollout schedule is necessary” and that the conversion of three NPAs per NPAC regions each quarter “is the maximum number of NPAs that are manageable”:

We believe that confining the rollout of pooling to three NPAs per NPAC region per quarter will ensure that our rollout schedule does not strain resources of the national thousands-block number Pooling Administrator and is undertaken smoothly. Also, a staggered roll-out will provide carriers time to upgrade or replace their SCPs and other components of their network, as necessary, if the increased volume of ported numbers as a result of pooling requires them to do so.<sup>56</sup>

The national system currently handles an average of 1.57 million individual number ports monthly for LEC pooling and porting or about 18.8 million for all of 2001. Assuming a five percent growth rate, LEC porting and pooling volumes should approximate 20.7 million during 2003. Assuming that 46.8 percent of the NPAs are pooled, the average number of CMRS pooled

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<sup>54</sup> The “slow horse” problem does *not* describe the LNP readiness of smaller CMRS carriers. *See* State Coordinating Group Comments at 12.

<sup>55</sup> The LNPA Working Group advised NANC in an October 15, 2001 State Report that NANC was upgrading its hardware so that the capacity of its SOA and LSMS interface systems would be “3-4 times that of Release 3.0,” but that “service provider systems must also support 3.1 Change Orders and faster throughput in order to achieve improved performance end-to-end.”

<sup>56</sup> *First NRO Order*, 15 FCC Rcd 7574, 7645-46 ¶ 159 (2000).

numbers processed in 2003 will approximate 36.8 million — an increase of over 277 percent.<sup>57</sup>

However, the WNPSC further estimates that, if CMRS carriers must also convert to LNP in November 2002, total CMRS porting and pooling volumes will approximate 78.6 million in 2003 — more than tripling the volumes that all carrier SOA and LSMS systems must be capable of accommodating.<sup>58</sup> See Exhibit A.

Such an immediate and drastic increase in traffic volumes is not a recommended approach if maintaining service quality and network reliability is important. Accordingly, industry should have an opportunity to adjust to the dramatic increases in traffic volumes from CMRS pooling before it must also adjust to further dramatic increases in traffic volumes from CMRS porting.

**B. There Is a Substantial Question Whether Existing Roaming Capabilities Will Be Negatively Impacted**

Congress has decreed that the “operation of seamless, ubiquitous, reliable wireless systems serve the public interest by enhancing public safety, improving the usefulness of communications services, and facilitating interstate commerce.”<sup>59</sup> Seamless and ubiquitous service is available only with roaming, and all available customer data confirms that the ability to roam is important to mobile customers. According to one study, “nearly three quarters of wireless phone

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<sup>57</sup> See the WNPSC February 13, 2001, Exhibit N Memo to the NAPM LLC.

<sup>58</sup> *See id.*

<sup>59</sup> H.R. REP. NO. 106-25, 10<sup>th</sup> Cong., 1<sup>st</sup> Sess. 9 (1999). *See also* PUB. L. NO. 106-81, 10<sup>th</sup> Cong., 1<sup>st</sup> Sess., 113 Stat. 1287, § 2(b) (Oct. 26, 1999)(A “seamless, ubiquitous, and reliable end-to-end infrastructure for . . . wireless communications” is necessary to meet “the Nation’s public safety and other communications needs.”).

users consider roaming to be very or somewhat important.”<sup>60</sup> Another study found that other than price, nationwide coverage is more important to consumers than any other feature.<sup>61</sup>

The Commission has also recognized that consumers “highly value” roaming and that roaming “is important to the development of nationwide, ubiquitous, and competitive wireless voice telecommunications.”<sup>62</sup> The Commission therefore specifically designed its LNP rules to preserve current roaming capabilities. For example, it adopted a nationwide LNP implementation date precisely so “roaming can be maintained.”<sup>63</sup> In addition, although the LNP obligation extends only to those CMRS carriers providing service in the one hundred most populous MSAs,<sup>64</sup> the Commission has further required that “all” CMRS carriers nationwide, no matter how small, “must be able to support roaming” once LNP is implemented.<sup>65</sup> As the states have acknowledged, “[t]o the extent that some carriers do not meet the [LNP] deadline, some customers will be dropped from the network when roaming outside their home area — a result that benefits neither the consumer nor the carriers.”<sup>66</sup>

The LNP roaming obligation extends to several hundred carriers — 250 according to AT&T Wireless.<sup>67</sup> Over two years ago, in April 1999, the Wireless Number Portability Subcommittee prepared a draft FCC public notice designed to alert all CMRS carriers of their need to perform necessary MIN/MDN separation modifications by November 24, 2002, but for what-

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<sup>60</sup> Strategis Group, Inc., *U.S. Cellular Marketplace*, § 9.8.5 at 277 (Feb. 2000). Roaming was deemed important by both personal and business users — 73% and 74%, respectively. *See id.* at 278, Table 9.6.

<sup>61</sup> *See* Peter D. Hart Research Associates, *The Wireless Marketplace in 2000*, at 11-12 (Feb. 2000), available at [www.wow-com.com/statsurv/survey/hart](http://www.wow-com.com/statsurv/survey/hart).

<sup>62</sup> *Second CMRS Interconnection Order*, 11 FCC Rcd 9462, 9464 ¶ 2, 9469 ¶ 11 (1996).

<sup>63</sup> *First LNP Order*, 11 FCC Rcd 8352, 8440 ¶ 166 (1996).

<sup>64</sup> *See* 47 C.F.R. § 52.31(a).

<sup>65</sup> *Id.* at § 52.31(a)(2).

<sup>66</sup> State Coordinating Group Comments at 12.

<sup>67</sup> *See* AT&T Wireless Comments at 12.

ever reason, the Commission declined to publish this public notice.<sup>68</sup> The CMRS industry has conducted an extensive outreach efforts to smaller carriers,<sup>69</sup> but there is reason to believe that a substantial number of carriers have not yet developed implementation plans. Indeed, the states recognize that “many smaller wireless carriers are confused about what they need to do and have not yet made the necessary arrangements to become LNP-capable.”<sup>70</sup> In addition, smaller carriers, like larger carriers, are also facing the challenge of meeting the Commission’s E911 Phase II location requirements.

If the Commission believes that the LNP mandate is still justified given today’s market conditions, it should at a minimum, poll smaller CMRS carriers regarding their readiness to meet the November 24, 2002 LNP start date. No one benefits if customers lose an existing capability that they deem important as a result of new FCC requirements.

As the Commission is aware, the MIN/MDN separation is needed for pooling, and all non-GSM carriers in the country must successfully complete this task by November 2002, if seamless roaming is to be preserved (even if they do not serve NPAs subject to pooling). Put another way, the failure of certain carriers to timely complete the MIN/MDN separation will mean that mobile customers with pooled numbers will be unable to roam. VoiceStream and U.S. Cellular submit that the public interest is not served by aggravating this roaming problem by ordering the simultaneous conversion to porting, with the result that customers with ported numbers will also be unable to roam. The Joint Commenters submits that the far better approach is to proceed with pooling, allow some time to ensure that existing roaming capabilities are preserved, and only then implement LNP.

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<sup>68</sup> See WNPSC draft FCC Public Notice dated April 19, 1999.

<sup>69</sup> AT&T Wireless describes some of these efforts. *See* AT&T Wireless Comments at n.45.

<sup>70</sup> State Coordinating Group Comments at 12.

**C. The Commission Should Require CMRS Resellers to Demonstrate Their LNP Readiness Through Participation in the WNPO and WTSC**

Resellers not only oppose LNP forbearance, they also oppose any extension of the current November 24, 2002 deadline.<sup>71</sup> According to resellers, the changes facilities-based carriers must make to implement LNP involve only “fringe modifications.”<sup>72</sup>

Notably absent in the reseller comments is any representation regarding their own readiness to implement LNP timely, or even an acknowledgment of their own LNP obligations. Resellers must make many of the same systems modifications that facilities-based carriers are making, including the complex intercarrier communications systems and procedures.<sup>73</sup> Facilities-based carriers should not be required to implement LNP for the benefit of resellers, if resellers are not making the same effort in their own systems. Accordingly, the Commission should require all CMRS resellers to participate in the Wireless Number Portability Operations Team (“WNPO”) and the Wireless Testing Subcommittee (“WTSC”) so they can demonstrate their ability to timely implement LNP on November 24, 2002. If they are unable to make such a demonstration, the Commission should disregard the arguments the resellers make in this proceeding.

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<sup>71</sup> See WorldCom Comments at 1 (“WorldCom . . . urges the Commission to maintain the current mandated wireless LNP deadline.”); ASCENT Comments at 2 (“ASCENT urges the Commission . . . to direct CMRS providers to implement service provider LNP in the top 100 [MSAs] by November 24, 2002.”).

<sup>72</sup> ASCENT Comments at 25.

<sup>73</sup> See WNPSC Report on Wireless Number Portability Technical Operational and Implementation Requires, Phase II, Wireless Reseller Process Flows, § 3.4 and Appendix D, approved by NANC on September 20, 2000 and submitted to the FCC *via* a September 26, 2000 cover letter.

#### **IV. THE COMMISSION SHOULD CONFIRM THAT STATES MAY NOT REQUIRE CMRS PROVIDERS TO IMPLEMENT LNP**

Vermont asks the Commission to rule that states may require CMRS carriers to implement LNP — that is, render meaningless any forbearance order that the Commission may enter.<sup>74</sup> The Commission cannot grant the requested relief, as the Joint Commenters demonstrate below.

Federal statutes limit the authority that states may exercise over CMRS providers. Section 332(c)(3) provides that “no State or federal government shall have authority to regulate the entry of or rates charged by any commercial mobile service . . . , except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.”<sup>75</sup> Courts have held that “Congress intended complete preemption” and that states are “completely preempted [from] the regulation of rates and market entry.”<sup>76</sup>

Vermont asserts that its imposition of LNP obligations on CMRS carriers would be permissible under the “other terms and conditions” clause of Section 332(c)(3), although it provides no explanation for this position.<sup>77</sup> This argument is not credible on its face. Vermont would have the Commission believe that Congress, after explicitly determining that CMRS carriers need not provide LNP,<sup>78</sup> and in a statute designed “to establish a Federal regulatory framework to govern the offering of all commercial mobile services,”<sup>79</sup> actually intended to give each state the authority to determine whether CMRS carriers should provide LNP.

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<sup>74</sup> See Vermont Comments at 5-7.

<sup>75</sup> 47 U.S.C. § 332(c)(3)(A).

<sup>76</sup> *Bastien v. AT&T Wireless Services*, 205 F.3d 983, 986-87 (7<sup>th</sup> Cir. 2000).

<sup>77</sup> Vermont does quote from a 1993 House Report. See Comments at 7. But courts have held that the views contained in this Report are “not particularly authoritative since it reflected only the views of one chamber of Congress.” *Bastien*, 205 F.3d at 987. In addition, there is nothing in that Report even suggesting that Congress intended to include LNP regulation within the “other terms and conditions” clause.

<sup>78</sup> See 47 U.S.C. § 251(b)(2).

<sup>79</sup> H.R. CONF. REP. NO. 103-213, 103d Cong., 1<sup>st</sup> Sess. 490 (1993).

In fact, a state's attempt to impose an LNP obligation on CMRS carriers would constitute the "regulation of entry" prohibited by Section 332(c)(3).<sup>80</sup> By imposing such a requirement, a state would either directly or indirectly condition the provision of service upon providing LNP — namely, regulate entry.

A state may not impose LNP obligations on CMRS providers even if LNP is not considered to constitute impermissible entry regulation. The FCC has exclusive jurisdiction over interstate telecommunications,<sup>81</sup> and Congress has specifically charged the Commission with fostering "the growth and development of mobile services that, by their nature, operation without regard to state lines as an integral part of the national telecommunications infrastructure."<sup>82</sup>

Assume Vermont required CMRS carriers to implement LNP. The Vermont Commission's authority extends at most to carriers providing services within its borders and then, only to their intrastate services. Carriers in other states would have no obligation to implement LNP because they are beyond the reach of Vermont's regulatory authority. In this scenario, Vermont mobile customers with ported numbers would be unable to receive any interstate calls (because originating networks would route the call to the wrong terminating carrier in Vermont). In addition, Vermont mobile customers could not use their service while traveling in other states, because networks in other states would not recognize ported numbers. In the end, and as the Commission has already recognized, CMRS carriers "cannot develop a localized number portability method without affecting the other states in their service areas and the carriers with whom they have roaming agreements across the country."<sup>83</sup>

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<sup>80</sup> It bears emphasis that the state entry prohibition in Section 332(c) is far more expansive than the entry prohibition contained in Section 253(a). The latter prohibits only state acts that "prohibit or have the effect of prohibiting" the ability of a carrier to provide its services. 47 U.S.C. § 253(a). The former prohibits all "regulat[ion] of entry."

<sup>81</sup> See 47 U.S.C. § 152(a).

<sup>82</sup> H.R. REP. NO. 103-111, 103d Cong. 1<sup>st</sup> Sess. 260 (1993).

<sup>83</sup> *Pennsylvania Numbering Order*, 13 FCC Rcd 19009, 19035-36 ¶ 41 (1998).



The Administrative Procedures Act empowers the Commission to issue “a declaratory order to terminate a controversy or remove uncertainty.”<sup>84</sup> So that carriers are relieved of the burden of litigating state LNP authority in multiple states, the Commission should confirm that states may not require CMRS providers to implement LNP.

**V. THE COMMISSION SHOULD ATTEMPT TO DECIDE THE FORBEARANCE ISSUE BY THE END OF THE YEAR**

CMRS carriers have encouraged the Commission to act promptly on the LNP forbearance petition. As VoiceStream and U.S. Cellular have noted, the “sooner the Commission acts on the Verizon Wireless LNP forbearance petition, the sooner carriers can re-deploy their resources and focus on timely implementation of pooling. The issues are straightforward and the Commission determined only two years ago that the statutory forbearance criteria had been satisfied.”<sup>85</sup>

**VI. CONCLUSION**

For all the foregoing reasons, VoiceStream and U.S. Cellular urge the Commission to repeal its LNP mandate, whether under Section 10 or Section 11 of the Communications Act, so that CMRS carriers can focus their resources on timely and successfully implementing number pooling. VoiceStream and U.S. Cellular further request that the Commission attempt to adopt an order in this proceeding by the end of the year.

Respectfully submitted,

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<sup>84</sup> 5 U.S.C. § 554(e).

<sup>85</sup> VoiceStream/U.S. Cellular Comments at 19.

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